No. 83-1632

Office-Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

—v.—

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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Question Presented

Whether, in an action brought under the Copyright Act concerning a news article published in a magazine about a book written by former President Gerald R. Ford that contained information about Mr. Ford's pardon of former President Richard M. Nixon and about other matters of state, the United States Court of Appeals for the Second Circuit was correct:

(a) in refusing to extend copyright protection to facts and other uncopyrightable materials;

(b) in holding that consideration of the four fair use factors set forth in the Copyright Act led to the conclusion that the magazine's minimal use of expression was fair; and

(c) in giving consideration in its ruling to interests grounded in principles of freedom of expression?

Parties Below

The parties to the proceedings below are those listed in the caption.*

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* Pursuant to Supreme Court Rule 28.1, we advise the Court that Nation Enterprises and The Nation Associates, Inc. ("The Nation") have no parent companies and no subsidiaries. The Nation Institute is an affiliate company of The Nation Associates.

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Consumers Union of United States, Inc. v. *General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3875 (U.S. May 14, 1984) (No. 83-1870) 31n

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Diamond v. *Am-Law Publishing Corp.*, 1984 CCH Copyright Law Dec. ¶ 25,627 (S.D.N.Y.), *appeal argued*, No. 84-7136 (2d Cir. June 18, 1984) 36n

Echevarria v. *Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S.D. Cal. 1935) 15

Eisenschiml v. *Fawcett Publications, Inc.*, 246 F.2d 598 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957) 21n

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Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 30

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Holmes v. *Hurst*, 174 U.S. 82 (1899) 14

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New York Times Co. v. *United States*, 403 U.S. 713 (1971) 44

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Nutt v. *National Institute Inc.*, 31 F.2d 236 (2d Cir. 1929) 20n

Orgel v. *Clark Boardman Co.*, 301 F.2d 119 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962) 20n

Pillsbury Co. v. *Milky Way Productions, Inc.*, 215 U.S.P.Q. 124 (N.D. Ga. 1981) 29-30

Regan v. *Time, Inc.*, 104 S. Ct. 3262 (1984) 30

Rokeach v. *Avco Embassy Pictures Corp.*, 197 U.S.P.Q. 155 (S.D.N.Y. 1978) 25

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Sid & Marty Krofft Television Productions, Inc. v. *McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) 42

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Wainwright Securities, Inc. v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) 20n

Williams v. *Rhodes*, 394 U.S. 23 (1968) 31

Williams & Wilkins Co. v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided Court*, 420 U.S. 376 (1975) 38

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Copyright Law Revision: Hearings on S. 597 Before Subcomm. on Patents, Trademarks, and Copyrights of Sen. Comm. on Judiciary, 90th Cong., 1st Sess. (1967) 34n-35n

Staff of House Comm. on Judiciary, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess., (Comm. Print 1963) 34n-35n

Reports:

Draft, Second Supplemental Report of Register of Copyrights on the General Revision of the U.S. Copyright Law, Subcomm. on Courts, Civil Liberties, and the Administration of Justice of House Comm. on Judiciary, 94th Cong., 1st Sess. (1975) 34n-35n

H.R. Comm. on Judiciary, 87th Cong., 1st Sess., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (Comm. Print 1961) ..11n, 13n, 34n-35n

H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967) 34n-35n

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) 12-13, 33, 35

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H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966) 34n-35n

S. Rep. No. 473, 94th Cong., 1st Sess. (1975) 33, 34-35

S. Rep. No. 983, 93d Cong., 2d Sess. (1974) 12-13

Subcomm. on Patents, Trademarks, and Copyrights of Senate Comm. on Judiciary, 86th Cong., 2d Sess., Copyright Law Revision Study No. 14 (Comm. Print 1960) (Latman, *Fair Use of Copyrighted Works*) 10-11

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Treatises

H. Ball, *The Law of Copyright and Literary Property* (1944) 12

A. Birrell, *The Law and History of Copyright in Books* (1899) 26n

B. Kaplan, *An Unhurried View of Copyright* (1967) ... 13n

1 M. Nimmer, *Nimmer on Copyright* (1984) 15, 15n, 25

3 M. Nimmer, *Nimmer on Copyright* (1984) 32, 36, 38

Other Authorities

L. Brandeis & S. Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) 37n

R. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569 (1963) 21

R. Gorman, *Fact or Fancy? The Implication for Copyright*, 29 J. Copyr. Soc. 560 (1983)..... 15n

The Jefferson Cyclopedia (J.P. Foley, ed. 1967) 42n-43n

1 F.L. Mott, *A History of American Magazines* (1957).. 13n

The New York Times

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3 *Roots of the Bill of Rights* (B. Schwartz, ed. 1980) 42n-43n

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The Pulitzer Prize Story II (J. Hohenberg, ed. 1980)... 28n

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NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

In the spring of 1979, Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. (hereinafter referred to as "Harper & Row") jointly published *A Time to Heal: The Autobiography of Gerald R. Ford*. (Ct. App. Op. A-5; R. Vol. I, TR A229, 238)[1] The book, as Harper & Row conceived it,

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1 The following abbreviations will be used in this brief: "JA ____" for citation to the Joint Appendix; "Ct. App. Op. ____" for citation to the opinion of the United States Court of Appeals for the Second Circuit (located in the Appendix to the Petition for a Writ of Certiorari); "Dist. Ct. Op. ____" for citation to the opinion of the United States District Court for the Southern District of New York (located in the Appendix to the Petition); "Pet. App." for citations to documents other than the court opinions located in the Appendix to the Petition; "R. Vol. ____, ____" for citation to the Joint Appendix before the

(*Footnote continued on following page*)

was to contain "significant hitherto unpublished material about (1) Mr. Ford's relationship with former President Nixon, [and] (2) the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford." (Ct. App. Op. A-5; JA 485-86) In its publicity materials, Harper & Row emphasized the political and factual nature of the book:

> What really happened behind the scenes? What nerve-wracking, challenging meetings were there with White House aides, the Congress, the press, his own family? Gerald Ford answers these questions fully, openly and fairly. From General Alexander Haig's first telephone call to the oath-taking ceremony eight days later, a cascade of events, many of them revelations, rush across the pages of Mr. Ford's book.

(JA 538-539) To protect against uncompensated disclosure of such information, Harper & Row's contract with former President Ford provided that he would not reveal prior to publication "the unique information not previously disclosed" about his career that he planned to disclose in his book. (Ct. App. Op. A-5; JA 484) Mr. Ford testified that he consequently refused to discuss publicly certain aspects of his pardon of former President Richard M. Nixon. (Ct. App. Op. A-5; JA 500-05, 526-29)[2]

(*Footnote continued from preceding page*)

Court of Appeals; and "Pet. Br." for citation to the Brief for Petitioners.

2 Former President Ford's testimony was:

> Q Do you have any personal recollection as to reaching a decision based on [your lawyer's] advice not to appear on television to discuss the pardon prior to publication of the book?
>
> • • •
>
> A The fact that I did not is the best evidence that I made such a decision.
>
> Q And it is a fact that you did not appear—
>
> A Not to discuss the pardon beyond the testimony of what I had previously given to the House Committee.
>
> Q That was because of your agreement with Harper & Row?
>
> A Correct.

(JA 502-03)

On March 14, 1979, Harper & Row sold first serial rights—the exclusive right to publish excerpts from the book prior to the book's publication—to *Time* magazine. (Ct. App. Op. A-5; R. Vol. IV, PTX 9 E565) *Time*'s license entitled it to publish in its April 23, 1979 issue approximately 7,500 words from Chapters One and Three of *A Time to Heal*; for that right *Time* agreed to pay Harper & Row $12,500 on signing the contract and $12,500 on April 16, 1979, the date *Time*'s April 23rd issue would be on sale. (Ct. App. Op. A-5 to A-6; R. Vol. IV, PTX 9 E565-66) In the event that material from the two chapters was published in some other medium prior to *Time*'s use, the contract authorized a renegotiation of the amount of the second payment. (R. Vol. IV, PTX 9 E566)

The Nation Article

Late in March, 1979, a copy of the 655-page, 200,000-word manuscript of *A Time to Heal* was provided to Victor Navasky, editor of The Nation. (Ct. App. Op. A-6; JA 274-75) It is undisputed that the manuscript was not sought; it was not paid for; indeed, The Nation had had no prior connection of any sort with the book. (Ct. App. Op. A-6; JA 274-75) It is also undisputed that Mr. Navasky had no knowledge at the time he received the manuscript of any serialization plans for the book (JA 316c) and no knowledge at the time The Nation's article was published of what excerpts *Time* anticipated publishing. (*Id.*)

The Nation published its 2,250-word article, entitled "The Ford Memoirs: Behind the Nixon Pardon," in its April 7, 1979 issue. (Ct. App. Op. A-6; R. Vol. IV, PTX 10 E569) Mr. Navasky had consulted with The Nation's counsel before publication and had been given a "green light" to publish under the fair use provisions of the Copyright Act. (Ct. App. Op. A-6; JA 317-20)

As its title suggests, The Nation's article centered about Mr. Ford's pardon of former President Nixon. Some of the information included in the article about the pardon had never before been revealed;[3] other information had previously been set forth by President Ford before a congressional committee. (R. Vol. V, DTX B E1224) Mr. Navasky testified that he organized the article to raise the implicit question whether there had been an impropriety or possible obstruction of justice, and that he wrote the article in such a way that the facts might speak for themselves. (JA 295-98)

Published at a time when both President Ford and General Alexander Haig, the individuals in addition to Mr. Nixon most

3 Mr. Ford testified as follows:

> Q As you sit here today, President Ford, do you believe that your belief at the time you spoke in Jackson, Mississippi, that had you said anything other than what you said then, "the whole house of cards might have collapsed," [Ct. App. Op. A-33] is a matter of public interest?
>
> A I think you have to relate that statement by myself which was quoted to the situation as it existed on August 1, 1974. Prior to that time I had been told, and I believed, that Mr. Nixon did not know of the Watergate prior to its being carried out. I had been told the morning of or during the day of August 1 that there might be some additional evidence, but I had not heard it myself. It was a very tense time in our history, and for me to publicly make statements based on this allegedly new information would potentially have created an additional crisis.
>
> And since I had not personally heard the so-called "new evidence," I did not feel that I would be acting properly to make any statement at that time different from what I had been saying previously.
>
> Q Had you told the American public at any point prior to the publication of your manuscript what you have just told us now?
>
> A Repeat that again.
>
> Q Had you told the American public, in any form, prior to the time your manuscript was published of the information that you have just told us in the last three or four sentences of your last answer?
>
> A No.

(JA 526-28; *see also* JA 465-70)

discussed in the article, were considered serious candidates for the 1980 Republican presidential nomination, the article related in its entirety to Mr. Ford's official conduct while in office. (JA 160-61, 281-89; *see* Ct. App. Op. A-31 to A-38) In addition to reporting on the pardon of Mr. Nixon, the article also reported on other newsworthy information in the book not relating to the pardon; none of that information (including, *inter alia*, information about President Ford's retention of Henry Kissinger as Secretary of State and Mr. Ford's consideration of Ronald Reagan as his 1976 running mate) had been revealed to the public before. (JA 465-70) Of the approximately eighty "word portraits" of world leaders written by President Ford, only a few words of one—a description of President Nixon—were included in The Nation article. (R. Vol. I, TR A202-03, A213-15)

On April 3, 1979, *Time* magazine's managing editor read The Nation article and called Harper & Row to request that *Time* be permitted to publish its excerpts from President Ford's book one week earlier than the date provided for in the contract. (Ct. App. Op. A-8; R. Vol. I, TR A231-34) Harper & Row refused *Time*'s request to publish one week early (Ct. App. Op. A-8; R. Vol. IV, PTX 31b, E827), thus causing *Time* not to print the excerpts from *A Time to Heal* and not to make the second $12,500 payment. (R. Vol. I, TR A245; R. Vol. IV, PTX 31b E827)

The District Court's Decision

Following publication of The Nation article, Harper & Row filed this copyright infringement action for the $12,500 they had not received from *Time*.[4] President Ford did not participate as a party to the action. (R. Vol. I, A27)

4 Common law causes of action were asserted initially but are no longer in the case. In a decision prior to trial, the District Court ruled that Harper & Row's common law claims for conversion and interference with advantageous contractual relationships were preempted by the Copyright Act (R. Vol. I, Op. A53), a ruling that Harper & Row unsuccessfully appealed to the Court of Appeals. (JA 5) Harper & Row have not challenged that ruling in this Court. (*See* Petition)

(*Footnote continued on following page*)

At trial, The Nation called Victor Navasky, editor of The Nation and author of the article at issue (R. Vol. I, TR A516, A532) and, as expert witnesses to testify about the newsworthy character of the article and certain of the fair use factors, three journalists: Professor Fred W. Friendly, Edward R. Murrow Professor of Broadcast Journalism at the Columbia University School of Journalism and former president of CBS News, and award-winning authors and journalists Richard Reeves (author of, among other books, *A Ford, Not A Lincoln*) and David Halberstam (author of, among other books, *The Best and the Brightest* and *The Powers That Be*). (JA 58-59, 142-44, 231-35) Harper & Row did not call any expert witnesses and did not cross-examine the three experts. (*See* R. Vol. I, TR 800)

After the non-jury trial, the United States District Court for the Southern District of New York (Owen, J.) held The Nation liable for $12,500 in damages for copyright infringement. Annexed to the brief opinion of the District Court as "The Court's Supplemental Findings of Fact" and "Conclusions of Law" was a xerox copy of Harper & Row's submitted findings of fact and conclusions of law with certain portions inked out by the court and the great bulk adopted *in haec verba* and signed by the court. (Dist. Ct. Op. B-14; *see* R. Vol. I, A878)

As the trial court viewed the case from the start, the question before it was simple: had The Nation demonstrated that its article was "newsworthy enough to justify a breach of the copyright laws"? (JA 94) Only in that situation, the court observed, were "the copyright laws . . . to be disregarded" (JA 96) and copyright violations "forgiven." (R. Vol. I, TR A707) Given that view of the case, the court conducted an inquiry into whether information contained in The Nation article did or did not constitute a "great piece of news." (JA

(*Footnote continued from preceding page*)

Harper & Row also had set forth a common law claim for misappropriation of "hot news," purportedly based on *International News Service* v. *Associated Press*, 248 U.S. 215 (1918). That claim was abandoned by Harper & Row by amendment to their complaint. (Ct. App. Op. A-9 n.2; *compare* R. Vol. I, Compl. A7 *with id.* A34)

209) Concluding that the information did not, the court held that the "revelations of the Ford memoirs were not such news, 'hot' or otherwise, as to permit the use of author Ford's copyrighted material." (Dist. Ct. Op. B-8)

Only after having rejected The Nation's fair use claims did the District Court address the issue of whether the material that had been "copied" was subject to Harper & Row's copyright. The court agreed that historical fact, memoranda prepared by others, and quotations from persons other than Mr. Ford were not included within Harper & Row's copyright. Nonetheless, the court declined to exclude this material from consideration before engaging in its fair use analysis because the "historical facts, memoranda, and statements [were] integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence." (Dist. Ct. Op. B-11)

The Opinion of the Court of Appeals

In reversing the judgment of the District Court, the United States Court of Appeals for the Second Circuit first assessed how much of the material The Nation had used was, in fact, copyrightable by Harper & Row. The court examined the material according to the principle codified in section 102(b) of the Copyright Act and embodied in case law that facts are not copyrightable, and then satisfied itself that The Nation had not appropriated the structure, arrangement, or mosaic of the book or any significant part of it. Having done that, the Court of Appeals held that to the extent The Nation article had reported facts, it had not infringed any copyright owned by Harper & Row. (Ct. App. Op. A-14 to A-16) The court also held that former President Ford's testimony before a congressional committee, which he had incorporated into the book, was a work of the United States Government and not subject to copyright. (Ct. App. Op. A-22) The court declined to hold, however, that President Ford's oral conversations about official matters while he was in office constituted a work of the United States Government. (Ct. App. Op. A-23) Finally, the

court excluded from material subject to Harper & Row's copyright conversations or written material that did not originate with former President Ford. (Ct. App. Op. A-22 to A-23)

Having determined that The Nation had used approximately 300 words of copyrightable expression, the Court of Appeals turned to the question of fair use. The court held clearly erroneous the District Court's conclusion "that 'the piece was not such news, "hot" or otherwise, as to permit the use.' " (Ct. App. Op. A-25)[5] The Court of Appeals rejected the District Court's legal standards for evaluating the four fair use factors. It concluded that the use had been for the purpose of news reporting, that the nature of the book was factual and political, that the expression copied was no more than was necessary for that purpose, and that any possible economic harm had been caused by the use of facts and not of expression. The Nation's use of small and scattered amounts of copyrighted expression was held to be fair. (Ct. App. Op. A-25 to A-29)

SUMMARY OF ARGUMENT

There are striking omissions in Harper & Row's presentation of their case to this Court. Absent from their brief is virtually any reference to two of the most elemental principles of copyright law. One is the dichotomy long established in law between what the copyright law protects—expression—and what it does not protect—information. There is, as well, only a glancing reference to the four factors set forth by Congress to determine if a use of expression is or is not fair. And there is barely a nod by Harper & Row to First Amendment principles beyond condemning the Court of Appeals for having considered them.

By virtually ignoring these matters, Harper & Row have all but ignored what this case is about. As we demonstrate in Part I of this brief, the Court of Appeals correctly determined that

5 Judge Meskill, who dissented, agreed that "the holding below that the *Nation* article was not news was clearly erroneous." (Ct. App. Op. A-45)

The Nation in its 2,500-word article about a 200,000-word book, a book written by the most powerful man in the nation about his presidency, did not appropriate the structure or mosaic of the book, let alone what the District Court referred to as its "totality." The court's conclusion that most of the material The Nation used was uncopyrightable fact or otherwise not subject to copyright protection is consistent with deeply rooted copyright law. Such material was, in a phrase Professor Latman used years ago, subject to "unlimited use" by anyone.

The Court of Appeals turned then to the issue of fair use. In Part II of this brief, we demonstrate that the court's treatment of each of the four fair use factors set forth by Congress was consistent not only with rulings as recent as *Sony Corp. of America* v. *Universal City Studios, Inc.*, 104 S. Ct. 774 (1984), but with long-established precedent. The Nation quoted about 300 words of copyrightable material from the Ford memoirs. Based on the undisputed testimony and its examination of both the book and The Nation article, the court correctly concluded that the purpose of The Nation's use was news reporting; the nature of the book was factual and political; the quotations in the article were "informative and neither superfluous or excessive for the article's purpose"; and that economic harm, if any, had been caused by The Nation's reporting of facts about the Nixon pardon and not by any act for which the Copyright Act permits recovery. That being so, the Court of Appeals rightly concluded that the use by The Nation of a "meager, indeed an infinitesimal amount" of President Ford's language constituted a fair use under governing law.

Much of Harper & Row's criticism of the Court of Appeals' opinion stems from the court's references to the First Amendment. In Part III of this brief, we demonstrate that the decision was consistent with both the Copyright Act and the First Amendment. Both the idea-expression dichotomy and the fair use doctrine serve the function of avoiding conflict between First Amendment precepts and those of the Copyright Act. In contrast, Harper & Row's grudging view of both

principles of copyright law would, if adopted, create continual conflict with the First Amendment itself. By interpreting copyright law consistently with its history, the Court of Appeals acted in accord not only with copyright principles but with those of freedom of expression.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY DETERMINED THAT MUCH OF WHAT THE NATION ALLEGEDLY COPIED WAS NOT SUBJECT TO HARPER & ROW'S COPYRIGHT

In analyzing the nature of copyrightability and in applying the fact-expression distinction, the Court of Appeals properly applied long-established principles of copyright law. None of the court's theories was novel; none conflicts with traditional copyright holdings. Commencing with the very methodology of the Court of Appeal's opinion, the opinion is consistent with the development of nearly two hundred years of copyright law and with the policies that underlie that law.

The District Court had first considered the question of whether The Nation article was "news reporting" and whether such reporting constituted fair use. (Dist. Ct. Op. B-9) The Court of Appeals rejected that analysis, considering first the threshold question of whether and to what extent material used by The Nation was even copyrightable by Harper & Row. (Ct. App. Op. A-14) By addressing that question first, the Court of Appeals engaged in the analysis mandated by the Copyright Act.

Professor Latman, in the study that formed the basis for Congress' debate on the inclusion of the fair use doctrine in the 1976 Act, restated the principle:

> [A] broad underlying premise for the doctrine of fair use is supplied by the notions that: (1) the user has unlimited use of a great deal of unprotected material embodied in a copyrighted work; and (2) the user may, under any circumstances, copy an insignificant portion of protected material.

Subcomm. on Patents, Trademarks, and Copyrights of Senate Comm. on Judiciary, 86th Cong., 2d Sess., Copyright Law Revision Study No. 14, 7 (Comm. Print 1960) (Latman, *Fair Use of Copyrighted Works*).[6]

Courts have analyzed works in this fashion for decades. In *American Code Co.* v. *Bensinger*, 282 F. 829 (2d Cir. 1922), for instance, the court wrote:

> If one takes matter which lies in the public domain, or which has been dedicated to the public by publication without securing copyright under the acts of Congress, and, adding thereto materials which are the result of his own efforts, publishes the whole and takes out a copyright of the book, the copyright is not void because of the inclusion therein of the uncopyrightable matter, but is valid as to the new and original matter which has been incorporated therein. It is necessary, however, to keep in mind the distinction between copyrightability and the effect and extent of the copyright when obtained. The degree of protection afforded by the copyright is measured by what is actually copyrightable in it; that is, by the degree and nature of the original work.

Id. at 834. *Accord Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F. Supp.

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6 The original report by the Register of Copyrights prepared in 1961 for Congress similarly states:

> Copyright does not preclude anyone from using the ideas or information disclosed in a copyrighted work. Beyond that, the work itself is subject to fair use.

H.R. Comm. on Judiciary, 87th Cong., 1st Sess., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 24 (Comm. Print 1961).

788 (S.D.N.Y. 1971); *Greenbie* v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957); *Hirsch* v. *Paramount Pictures, Inc.*, 17 F. Supp. 816 (S.D. Cal. 1937).

In those cases, as in this, the courts were following precisely what Professor Ball defined as the law in 1944:

> In a suit for copyright infringement, the court directs its inquiry to a determination of: (1) What was appropriated by the defendant from the plaintiff; (2) if anything was appropriated, whether such appropriation was of copyrightable matter; and, if so, (3) whether it was substantial and material appropriation.

H. Ball, *The Law of Copyright and Literary Property* 343 (1944). As we next demonstrate, the Court of Appeals correctly decided each of these issues.

A. The Court Of Appeals Correctly Determined That The Nation's Use Of Fact And Not Expression Did Not Infringe Any Copyright Held By Harper & Row

1. The Origin of the Distinction Between Fact and Expression

At the heart of the Court of Appeals' analysis is a proposition of law so long established that its explicit inclusion in the Copyright Act of 1976 only confirmed what had long been recognized: the copyright laws protect only expression. Ideas and facts are not copyrightable.

Section 102(b) of the Act states:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Section 102(b) reflects Congress' view that "[c]opyright does not preclude others from using the ideas or information revealed by the author's work," and Congress' recognition of "the basic dichotomy between expression and idea" and of the uncopyrightability of ideas, facts, and information. S. Rep. No. 983, 93d Cong., 2d Sess. 107-08 (1974); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 56-57 (1976).[7]

The idea-expression distinction is rooted in early English and American cases in which the courts attempted to forge an acceptable test for copyright infringement when the defendant had used only part of a copyrighted work.[8] The distinction was first expressed in *Millar* v. *Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769), in which Justice Yates wrote:

> Property is founded on occupancy.
>
> But how is possession to be taken, or any act of occupancy asserted, on mere intellectual ideas? . . .
>
> * * *
>
> [W]hat distinguishing marks can a man fix upon a set of intellectual ideas, so as to call himself the proprietor of them? They have no earmarks upon them.

4 Burr. at 2357, 2366, 98 Eng. Rep. at 230, 235. The answer was that the particular order of words, the expression, could

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7 The distinction was noted in 1961 by the Register of Copyrights in his initial report to Congress on the revision of the copyright law:

> Copyright does not preclude others from using the ideas or information revealed by the author's work. . . . [A]nyone is free to create his own expression of the same concepts or to make practical use of them, as long as he does not copy the author's form of expression.

Report of the Register of Copyrights, *supra*, at 3.

8 The problem did not arise with any frequency for many decades after the first copyright statute was enacted in England in 1709, 8 Anne c. 19 (1710), primarily because many uses protected today were not protected then. During the eighteenth and most of the nineteenth centuries, anyone could translate a work with impunity, dramatize a novel, or, for the most part, publish an abridgement of another's work. B. Kaplan, *An Unhurried View of Copyright* 9-12, 28-32 (1967). In the early years of this nation, newspapers and magazines, moreover, copied freely from one another. 1 F.L. Mott, *A History of American Magazines* 39 (1957).

serve as the "earmarks" of intellectual property. The distinction grew into doctrine. *See, e.g., Goldstein* v. *California*, 412 U.S. 546, 571 (1973) (no restraint placed by state "on the use of an idea or concept"); *Mazer* v. *Stein*, 347 U.S. 201, 217 (1954) ("[u]nlike a patent, a copyright gives no exclusive right to the act disclosed; protection is only given to the expression of the idea—not the idea itself") (footnote omitted); *International News Service* v. *Associated Press*, 248 U.S. 215, 254 (1918) ("the element in intellectual productions which secures such protection is not the knowledge, truths, ideas, or emotions which the composition expresses, but the form or sequence in which they are expressed"); *Holmes* v. *Hurst*, 174 U.S. 82, 86 (1899) ("[t]he right is to that arrangement of words which the author has selected to express his ideas"); *Baker* v. *Selden*, 101 U.S. 99, 102-03 (1879); *Nichols* v. *Universal Pictures Corp.*, 34 F.2d 145, 147-48 (S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *Story* v. *Holcombe*, 4 McLean 306, 316, 23 F. Cas. 171 (C.C.D. Ohio 1847) (No. 13497).

The idea-expression distinction was extended early on to facts and information as well as to ideas. In *Matthewson* v. *Stockdale*, 12 Ves. Jun. 270, 275, 33 Eng. Rep. 103, 105 (Ch. 1806), Lord Erskine wrote: "no man can monopolize such subjects as the English Channel, the Island of St. Domingo, or the events of the world." The distinction was extended specifically to historical and biographical information. *Lake* v. *Columbia Broadcasting System, Inc.*, 140 F. Supp. 707, 708-09 (S.D. Cal. 1935), adjudicated a claimed infringement of a biography of Wyatt Earp. The court wrote: "[h]istorical facts and events in themselves are in the public domain and are not entitled to copyright protection." *Accord Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) ("while the mode of expression employed by [the first author] is entitled to copyright protection, he could not acquire by copyright a monopoly in the narration of historical events"); *Musto* v. *Meyer*, 434 F. Supp. 32 (S.D.N.Y. 1977), *aff'd mem.*, 598 F.2d

609 (2d Cir. 1979) (article about Sigmund Freud and Sherlock Holmes held not infringed by motion picture); *Gardner* v. *Nizer*, 391 F. Supp. 910 (S.D.N.Y. 1975) (any facts copied from biography of Julius and Ethel Rosenberg were uncopyrightable); *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F. Supp. 788 (S.D.N.Y. 1971) (no copyrightability in facts contained in writings about Ezra Pound); *Greenbie* v. *Noble*, 151 F. Supp. 45, 66-67 (S.D.N.Y. 1957) (" '[i]t is pure superarrogation for one to suggest that he has any proprietary interest in an era of history.' . . . The second author may also adopt the first author's historical ideas and theories since the law of copyright only protects an author's mode of expression and not his ideas"); *Echevarria* v. *Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S.D. Cal. 1935) (no copyright existed in historical incidents).

The rationale for the distinction and the decisions is clear. To allow anyone to copyright facts, information, or news would contravene the very purpose of the copyright clause of the United States Constitution, *viz.*, "to promote the progress of science and the useful arts." U.S. Const. art. I, § 8, cl. 8. It would permit, as Professor Nimmer observed in a passage quoted by the Court of Appeals, a newspaper to own the facts about Watergate. (Ct. App. Op. A-19 n.12) *See* 1 M. Nimmer, *Nimmer on Copyright* § 2.11[E] at 2-169 (1984). To allow ownership of facts and information would contravene the purpose of the copyright laws while simultaneously conflicting with the First Amendment.[9]

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9 The legal theory buttressing the policy is basic. Section 102(a) of the Act states that copyright protection extends only to "original acts of authorship." Professor Nimmer explains:

> Facts may be discovered, but they are not created by an act of authorship. One who discovers an otherwise unknown fact may well have performed a socially useful function, but the discovery as such does not render him an "author" in either the constitutional or statutory sense.

1 M. Nimmer, *Nimmer on Copyright* § 2.11[A] at 2-158 (1984) (footnotes omitted). *See also* R. Gorman, *Fact or Fancy? The Implication for Copy.*, 29 J. Copyr. Soc. 560, 571 (1983).

2. Application of the Distinction Between Fact and Expression to this Case

The Court of Appeals applied this maxim and ruled that no copyright attached to the facts Mr. Ford had recorded. The court therefore found that those parts of The Nation article that did not contain Mr. Ford's expression did not infringe his copyright.[10]

Examining a passage from the article illustrates how the principle applies to this case. Harper & Row claim that a sentence in The Nation article was "copied" from a paragraph in the manuscript. (Pet. App. at E-3) Comparing the manuscript with the article, however, reveals that the only material "copied" was fact.

The manuscript reads:

> About a month before the convention, my aides had met with Reagan's representatives to discuss the need for party unity. And they had reached an agreement. At the end of the Presidential balloting, the winner would go to the loser's hotel suite and congratulate his opponent for waging a fine campaign. Together, they would appear at a press conference and urge all Republicans to put aside their differences and rally behind the ticket. That was the only way we could leave Kansas City with a hope of victory. When it appeared that I was going to win, Sears contacted Cheney and refined the scenario. He insisted on two conditions. The first was that I had to see Reagan alone; there could be no aides from either camp in the room. Secondly, under no circumstances should I offer him the nomination to be Vice President. Reagan had said all along that he wasn't interested in the job. He had meant what he said. If I tried to talk him out of it, he would have to turn me down, and that would be em-

10 Included in the Joint Appendix is a sentence by sentence analysis of the article illustrating why much of the article cannot be said to constitute a taking of expression or to infringe any copyright held by Harper & Row. (JA 557-625)

> barrassing because it would appear that he was refusing to help the GOP. When Cheney relayed those conditions to me, I agreed to go along with them. I would need Reagan's assistance in the fall campaign. It would be stupid to anger him or his followers at this moment.
>
> Later I was told that just before my arrival at the Californian's hotel, one of his closest advisers, businessman Justin Dart, had urged him to say yes if I asked him to be my running mate. Regardless of anything he'd said before, Dart had insisted, it was his patriotic duty to accept the number two post. Finally, according to Dart, Reagan had agreed. But at the time, no one mentioned this new development to me. Had I been aware of the Dart-Reagan conversation, would I have chosen him? I can't say for sure—I thought his challenge had been divisive, and that it would probably hurt the party in the fall campaign; additionally, I resented some of the things that he'd been saying about me and my Administration's policies—but I certainly would have considered him.

(JA 628-29)

The Nation article reads:

> Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate.

(JA 627)[11] This and other similarly structured portions of the article use facts and not expression. *See Hoehling* v. *Universal*

11 In Plaintiffs' Exhibit 11 (Pet. App. at E-4 to E-41), Harper & Row characterized, both by their selection of manuscript pages and by their yellow markings, an unreasonably small portion of the manuscript as the source of the information for The Nation article. A fair reading of the manuscript reveals that the *information* contained in The Nation's statements can be gleaned only by referring to far larger portions of the manuscript than are reproduced in Plaintiffs' Exhibit 11. By reading the paragraph from the manuscript quoted in Plaintiffs' Exhibit 11 as the source of the article's statement about Mr. Reagan, for example, it is impossible to tell that there had been a "misunder-

(*Footnote continued on following page*)

City Studios, Inc., 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

Harper & Row's various criticisms of this portion of the Court of Appeals' opinion have a common theme: all seek to avoid a body of law that purposefully sanctions reporting on facts and ideas in any copyrighted work. Harper & Row claim, for example, that the Court of Appeals excluded from its consideration critical elements of authorship other than expression—the selection and arrangement of facts. (*See* Pet. Br. at 15-21) The court did nothing of the sort. It ruled that:

> There are, however, several general principles according to which the boundary between fact and expression may be mapped for works in which much factual material is described. An author's originality exists, in part, in his overall arrangement of facts. The structure he chooses for the work as a whole is important. *See Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, *supra*, 558 F.2d at 94, and *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F. Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974). *In this case there can be no concern that this mode of expression was usurped; the* Nation *article drew only upon scattered parts and not the total entity with its unique and protected mosaic.*

(Ct. App. Op. A-16; emphasis added) The court emphasized this point again when it stated:

> Here, *The Nation* drew on scattered pieces of information from different pages and different chapters, and then described that information in its own words. This is precisely the situation to which Nimmer refers in his treatise when he writes:

(*Footnote continued from preceding page*)

standing" between Mr. Ford and Mr. Reagan. A reader must read the preceding paragraph in the manuscript to discern that fact, because the "misunderstanding" derived from the change in the ground rules for the Ford-Reagan interview and from Mr. Ford's ignorance of the change. A comparison of relevant passages in the manuscript and the article is set forth at JA 627-704.

> "What if the defendant has copied neither the plaintiff's word for word form of expression, nor the selection and arrangement of plaintiff's facts, but has nevertheless copied one or more facts which appear in plaintiff's factual work? Here the answer on principle should be that plaintiff cannot establish copyright infringement." 1 *Nimmer on Copyright* § 2.11[E] at 2-164 (1983).

(Ct. App. Op. A-18)

The correctness of this holding is graphically illustrated by Plaintiffs' Trial Exhibit 11 (Pet. App. E-1 to E-41), in which Harper & Row list the pages in the manuscript that they claim correspond to consecutive sections of the article. The page citations to the manuscript are as follows: 607-08, 401, 44, 496, 1, 2-3, 4, 8, 7, 4-5, 5, 5-6, 8, 14, 15, 16, 16, 18, 19, 21, 266, 236, 246, 248, 249, 238-39, 239, 243, 245, 246, 250, 250-51, 251, 252, 253, 254, 256, 298, 299, 46, 494, 537, 155-56, 216, 415, 416, 416, 53-54, 57. A 2,250-word news article that Harper & Row claim is "copied" from such scattered pages in a 200,000-word manuscript hardly can be said to usurp any structure or mosaic.

Turning next to the issue of paraphrase, the Court of Appeals concluded that "paraphrasings of disparate facts such as those found in this case" could not constitute infringement. (Ct. App. Op. A-16 to A-17; *see* Pet. Br. at 21-23) The court (using the word "paraphrase" to mean the use of fact and not of expression) then distinguished cases in which virtually an entire work had been appropriated,[12] commenting:

> [I]f *The Nation* had taken, for example, . . . all of a chapter and merely changed the language here and there,

12 An example of such appropriation, referred to by the Court of Appeals, is *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F. Supp. 686 (S.D.N.Y.), *aff'd per curiam*, 500 F.2d 1221 (2d Cir. 1974). (Ct. App. Op. A-16) The second book in *Meredith* was effectively a duplicate of the first, which had served as the model for "topics to be included, weighting of topics, and sequencing of topics." 387 F. Supp. at 687.

paraphrasing would not and should not suffice to protect it.

(Ct. App. Op. A-17 to A-18)

The court's conclusion is in full accord with copyright precedent. Cases that have invoked the word "paraphrase" to justify a finding of infringement are ones in which much or most of the work has been copied[13] or in which the material paraphrased has been virtually void of protectible expression.[14] "Paraphrase" has never been sufficient for infringement in a case such as this.

The reason for that is plain: to hold The Nation liable because it paraphrased facts when it summarized President Ford's discussion of his decision to pardon Mr. Nixon is effectively to preclude any such reporting. To rule, as the Court of Appeals observed, that it is impermissible copying to paraphrase discrete facts is to do precisely what the copyright law forbids: to permit copyright protection of information itself. (Ct. App. Op. A-18)

Nor do cases involving possible infringement of *compilations* of fact—*e.g.*, catalogues of baseball cards, telephone directories, and the like—contradict this aspect of the Court of Appeals' opinion. (Pet. Br. at 16-21) Compilations are works on the fringes of copyright, *e.g.*, directories that consist largely of uncopyrightable facts, anthologies made up of works in the

13 *See Nutt* v. *National Institute Inc.*, 31 F.2d 236, 238 (2d Cir. 1929) (virtually entire lecture replicated with only a "colorable variation"); *Orgel* v. *Clark Boardman Co.*, 301 F.2d 119, 120 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962) (defendant had done "little more than edit" plaintiff's work); *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (expression had been appropriated and the defendants had repeatedly "passed off" the plaintiff's product as their own). (*See* Pet. Br. at 15-18)

14 *See Flick-Reedy Corp.* v. *Hydro-Line Mfg. Co.*, 241 F. Supp. 127 (N.D. Ill. 1964), *aff'd in part*, 351 F.2d 546 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966) (mathematical data or formulae); *Wagner* v. *Meccano, Ltd.*, 246 F. 603 (6th Cir. 1917) (instruction manual for machinery). (*See* Pet. Br. at 21-22)

public domain, law books that include uncopyrightable excerpts of cases. In such works, the only original and protectible element is the arrangement and/or the selection of material. In these cases, infringement consists in copying the selection or arrangement—precisely what did not occur here.

As the court in *Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981), put it:

> It is difficult to adequately distinguish some of the directory cases, and particularly the language of the opinions. . . . A copyright in a directory, however, is properly viewed as resting on the originality of the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information. . . .
>
> In any event, it may be better to recognize the directory cases as being in a category by themselves rather than to attempt to bring their results and rationale to bear on nondirectory cases.

Id. at 1369-70 (citations omitted).[15] *See* R. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569, 1570 (1963).

15 *Miller* and other cases cited by Harper & Row support The Nation's position. In *Miller*, the court overruled the district court on the ground that it had instructed the jury that research was copyrightable, noting that the copyright law was not intended "to reward . . . the efforts involved in discovering and exposing facts." *Id.* at 1369. In *Eisenschiml* v. *Fawcett Publications, Inc.*, 246 F.2d 598, 603 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957), the court, noting that "[i]deas as such are not protected by the law of copyright," found that despite numerous examples of close paraphrasing by the defendant magazine writer there had not been infringement of the plaintiff's book. In *Holdredge* v. *Knight Publishing Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963), the court based its holding on the defendant's copying of the "manner and style in which the plaintiff chose to set down the factual and historical material she used, and to express her thoughts and conclusions." Still other cases cited by Harper & Row stand simply for the proposition that expression is protected and information is not. *See, e.g., Chicago Record-Herald Co.* v. *Tribune Ass'n*, 275 F. 797, 799 (7th Cir. 1921); *Amana Refrigeration, Inc.* v. *Consumers Union of the United States, Inc.*, 431 F. Supp. 324, 326 (N.D. Iowa 1977). (*See* Pet. Br. at 16-17)

Harper & Row repeatedly accuse the Court of Appeals of erroneously holding that "facts coupled with expression cannot constitute a copyrightable totality." (Pet. Br. at 12, 18-21) To the contrary, as set forth above, the Court of Appeals assured itself that the "totality" of the book—*i.e.*, its structure or mosaic—had not been taken before concluding that the reporting of facts did not invade the book's copyright.

Harper & Row's "totality" is of a different sort. The District Court put it this way:

> [I]t is the totality of these [uncopyrightable] facts and memoranda collected together with Ford's reflections that made them of value to The Nation. Correspondingly, it is this same totality that is protected by the copyright laws.

(Dist. Ct. Op. B-10 to B-11)[16] Reduced to its essence, this articulation would permit a copyright holder to own a vast amount of uncopyrighted and uncopyrightable material in the service of protecting the "totality" of a work. This would be so even when the structure of the book was not taken, so long as one *uncopyrightable* fact of major importance was reported. To so hold would be to conclude that, in copyrighting his book, Mr. Ford and through him Harper & Row gained a monopoly on the facts of the Nixon pardon—precisely what the fact-expression distinction seeks to avoid.[17]

At its core, Harper & Row's argument is directed less at the Court of Appeals' ruling than at the fact-expression distinction

16 Harper & Row inaccurately characterize this passage as a "finding" that is "unchallenged." (Pet. Br. at 18) This passage formed part of the District Court's opinion that The Nation not only challenged in the Court of Appeals, but that the Court of Appeals reversed as legally insupportable. The same may be said of other "findings" that Harper & Row describe as "unchallenged." (Pet. Br. at 23, 24, 36, 41)

17 For example, The Nation article quoted a memorandum written by a Watergate prosecutor detailing Mr. Nixon's possible areas of criminal liability. (Ct. App. Op. A-33 to A-34) Mr. Ford included this memorandum in his book as influencing his decision to pardon Mr. Nixon. It was certainly Mr. Ford's consideration of the memorandum that interested The Nation in it. According to the District Court, therefore, both the memorandum and the fact that Mr. Ford considered it became the property of Mr. Ford and could not be reported by The Nation even if no expression at all had been used.

itself. If the "overall arrangement of facts" by Mr. Ford (Ct. App. Op. A-16) had been appropriated by another, nothing in the Court of Appeals' decision would protect the infringer. If too much expression had been quoted, nothing in the court's interpretation of the fair use doctrine would protect the infringer. What the decision of the Court of Appeals permits is what Harper & Row would prohibit: a news article about a forthcoming book on public affairs that does *not* appropriate any such "arrangement" and does *not* quote more expression from the book than the fair use doctrine allows.

It is no answer for Harper & Row to say that they seek no more than to be the "owner" of President Ford's "description" of the pardon. (Pet. Br. at 23) It should be clear that Mr. Ford as a participant in the events he described does not have a greater monopoly on the facts he disclosed than a journalist or an historian would have. But Harper & Row's emphasis on Mr. Ford's "unique perspective" and on "the expressive nature of autobiography" (Pet. Br. at 18) would lead to just that. It is one thing to say that Harper & Row may seek the assistance of the courts in protecting the use of the book's expression or that they may seek to be first to disclose uncopyrightable information learned by President Ford while in office. To contend, however, that the permissible use of such a work is narrower simply because President Ford was, as it were, a first person witness to the events of his presidency turns the copyright law, not to say First Amendment principles, inside out. That President Ford knows facts about what occurred while he was in office—*e.g.*, what statement he read to General Haig about pardoning Mr. Nixon—is hardly a basis for affording him legal protection with respect to the disclosure of that information that the copyright laws grant to no one else.

Harper & Row may seek to be first to disclose uncopyrightable information in a book; nothing in the copyright law precludes news reporting on the information contained in that book.[18]

18 As noted previously, all of Harper & Row's potential common law claims have either been dropped or not pressed in this Court. *See* n.4, *supra*.

B. The Court Of Appeals Correctly Determined That The Nation's Use Of Other Uncopyrightable Material Did Not Infringe Harper & Row's Copyright

The Court of Appeals also held that certain quotations from the book did not infringe any copyright held by Harper & Row.[19] Both the Court of Appeals and the District Court agreed that "work[s] of the United States Government" are not copyrightable. (Ct. App. Op. A-22; Dist. Ct. Op. B-9 to B-10) *See* 17 U.S.C. § 105 (1982). Such works are defined as those "prepared by an officer or employee of the United States Government." 17 U.S.C. § 101 (1982).

Mr. Ford surely could not acquire or transfer a copyright in the memorandum quoted in the article that had been written by prosecutor Henry Ruth about the status of the criminal investigation of Mr. Nixon (Ct. App. Op. A-33 to A-34), for example, because that memorandum had been prepared by a government employee in the course of his duties. Nor can it be questioned that the written statement President Ford read over the telephone to General Haig, which is quoted in the article (Ct. App. Op. A-33), is an uncopyrightable work of the United States Government.

Similarly, material that was both a government work and previously placed in the public domain by former President Ford cannot now form the basis of an infringement suit. In President Ford's testimony before the Subcommittee on Criminal Justice, Committee on the Judiciary of the House of Representatives, he revealed information and used expression that he later re-used, virtually verbatim, in his manuscript. (*See* JA 705-17) Mr. Trevor Armbrister, who assisted Mr. Ford in writing the book, testified at the trial that portions of the manuscript allegedly copied by the article were based on the pardon testimony. (R. Vol. I, TR A170-71; R. Vol. V, PTX 43, E1067) The United States Government Printing Office published the pardon testimony without a copyright notice in

19 The Court of Appeals rejected The Nation's argument that oral conversations of President Ford about official business held while in office were works of the United States Government. (Ct. App. Op. at A-19) We do not press that argument in this Court.

1975, well before the manuscript's preparation. *See Pardon of Richard M. Nixon, and Related Matters: Hearings Before Subcomm. on Criminal Justice of House Comm. on Judiciary*, 93d Cong., 2d Sess. at 90-151 (1974) (R. Vol. IV, PTX E1224-56). This publication was more than adequate to inject the testimony into the public domain. *See* 1 M. Nimmer, *Nimmer on Copyright* § 4.04 (1984). Factual material "published and incorporated in official government records for the benefit of the public at large may not be privately appropriated and 'taken from that public under the guise of copyright.' " *Greenbie* v. *Noble*, 151 F. Supp. 45, 66 (S.D.N.Y. 1957). This has been the law for more than sixty years. *American Code Co.* v. *Bensinger*, 282 F. 829, 834 (2d Cir. 1922). *See Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

Finally, material originating with persons other than Mr. Ford is not protected by Harper & Row's copyright. The Constitution's reservation of copyright "to Authors," Art. I, § 8, cl. 8, and the limitation of copyright in the Copyright Act of 1976 to "original works of authorship," 17 U.S.C. § 102(a) (1982), require that material for which copyright is sought be original. Consequently, the courts uniformly have held that if an author quotes another's words, he may not recover for their infringement. *Suid* v. *Newsweek Magazine*, 503 F. Supp. 146, 148 (D.D.C. 1980); *Alexander* v. *Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978); *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F. Supp. 788, 798 (S.D.N.Y. 1971); *Rokeach* v. *Avco Embassy Pictures Corp.*, 197 U.S.P.Q. 155, 161 (S.D.N.Y. 1978); *Estate of Hemingway* v. *Random House, Inc.*, 23 N.Y.2d 341, 349, 244 N.E.2d 250, 256, 296 N.Y.S.2d 771, 779 (1968).

Both the Court of Appeals' analysis and its conclusion that much of what The Nation reported on in its article is not copyrightable are thus consistent with long-established precedent. A contrary result would put at risk all who refer to facts or information first uncovered by another. That is precisely what the Copyright Act seeks to avoid.

II.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE USE MADE OF THE BOOK WAS FAIR

Having concluded that much of what The Nation reported on in its news article about the Ford book was not copyrightable by Harper & Row, the Court of Appeals then examined the quotation by The Nation of approximately 300 copyrightable words from the book to determine whether The Nation's use of them had been fair. Those quotations, as summarized by the Court of Appeals, are a number of "scattered phrases," the larger part of which is "a short segment of Ford's conversations with Henry Kissinger and several other individuals and Ford's impressionistic depictions of Nixon ill with phlebitis after the resignation and pardon and of Nixon's character." (Ct. App. Op. A-23) The Court of Appeals' conclusion that those quotations of expression constituted fair use was, as we next demonstrate, correct and entirely consistent with governing law.

In section 107 of the Copyright Act of 1976, Congress codified the common law doctrine of fair use.[20] Four factors were specifically identified by Congress. The Second Circuit examined each of them and determined as a matter of law on the undisputed record before it that The Nation's use was fair. We turn next to each of those factors.

20 The doctrine appeared in the law as early as 1802. Lord Ellenborough wrote in *Cary* v. *Kearsley*, 4 Esp. 168, 170 Eng. Rep. 679, 680 (K.B. 1802): "[t]hat part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action." Not until the end of the nineteenth century was it "understood that to publish in an anthology a complete poem without the proprietor's leave is to permit a breach of the law of copyright." A. Birrell, *The Law and History of Copyright in Books* 180 (1899). In the United States, the 1841 case of *Folsom* v. *Marsh*, 2 Story 100, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901), involved the taking of 319 full pages of the letters of George Washington. Notwithstanding the enormity of the appropriation, Justice Story observed that the question of whether such a taking was unprotected was one that was "intricate and embarrassing," calling for "subtile," "refined," and "almost evanescent" distinctions.

A. The Purpose Of The Use

Section 107 of the Act cites news reporting as one purpose lending itself most readily to a finding of fair use. The Court of Appeals unanimously held that The Nation article plainly constituted news reporting and that the District Court's ruling to the contrary was clearly erroneous. (Ct. App. Op. A-25, A-45) Rejecting the District Court's failure to find that the article constituted news reporting because Judge Owen disapproved of "the quality of the journalism," the court held "that the task of courts in 'fair use' analysis should be understood not as deciding what makes bona fide news, but as examining whether a claim of 'news reporting' is false." (Ct. App. Op. A-26)

In all respects, the decision of the Court of Appeals was correct. The District Court had refused to recognize the article as news reporting despite uncontradicted testimony, in addition to that of The Nation's editor, by three nationally recognized experts on news reporting—Fred W. Friendly, David Halberstam, and Richard Reeves—that the article plainly constituted serious and significant news reporting. (JA 72, 210-11, 265) In essence, the District Court merely substituted its own news judgment for those expert in the field that too little in The Nation article was "new" and that the article was an example of "poor journalism." (Dist. Ct. Op. B-8, B-16 to B-17)

Harper & Row now seek to resurrect these rightly rejected concepts when they urge this Court to reverse the Court of Appeals on the ground that The Nation article was a non-productive use that had no public benefit. In arguing that The Nation's use was non-productive (Pet. Br. at 37-38), Harper & Row mistake both the legal standards set forth in this Court's opinion in *Sony Corp. of America* v. *Universal City Studios, Inc.*, 104 S. Ct. 774 (1984), and the proper application of those standards to this case. As this Court well recalls, at issue in *Sony* was whether home videotaping was a productive use. *Id.* at 795 n.40, 807 (opinion of the Court per Stevens, J.; Blackmun, J., dissenting). The discussion in the dissent relied upon by Harper & Row (Pet. Br. at 34) explicitly stated that news reporting was a presumptively productive use:

> The situations in which fair use is most commonly recognized are listed in § 107 itself; fair use may be found when a work is used "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research." The House and Senate reports expand on this list somewhat, and other examples may be found in the case law. Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work.

Id. at 807 (footnotes omitted; emphasis in original).

Harper & Row are similarly mistaken when they claim that the use was not productive and thus presumptively not fair because "nothing at all" was added and because "legitimate" news reporting contains "original research." (Pet. Br. at 36) Not only was all the experts' testimony at trial to the contrary (JA 111-13, 210, 264-67), but the very notion that news reporting is not "legitimate" because the news itself might otherwise become publicly available in two or four weeks is simply frivolous. It is understandable that book publishers who sell news would prefer to be the first to do so; it is incomprehensible that the argument should seriously be made that a news article about a former president's forthcoming book may be considered neither "news reporting" nor "legitimate" news reporting.[21] In fact, the Report of the Register, contained in both the House and Senate Reports on section 107, includes the following example of fair use: "summary of an address or article, with brief quotations, in a news report." *Id.* at 807 n. 29.

The nature of the task Harper & Row would impose upon the courts is illustrated by Harper & Row's criticism of The

21 It is noteworthy that the first Pulitzer Prize for Meritorious Public Service was awarded to *The New York Times* in 1918 "for its public service in publishing in full so many official reports, documents and speeches by European Statesmen relating to the progress and conduct of the war." *The Pulitzer Prize Story* 335-36 (J. Hohenberg, ed. 1959). Subsequent Pulitzer Prizes were awarded for reporting on an FBI report in the Harry Dexter White case "before it was laid before the Senate by J. Edgar Hoover," and for the publication of the Pentagon Papers. *Id.* at 346; *The Pulitzer Prize Story II* 351 (J. Hohenberg, ed. 1980).

Nation's rejection of what they term a productive use—an editorial—in favor of what they mistakenly term an non-productive use—a news story. (Pet. Br. at 37-38) How are the courts to evaluate which use is more productive? Are editorials more "productive" because they criticize rather than summarize?

In deciding copyright cases, courts historically have refrained from making the very determinations that Harper & Row would import into the law. In *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903), Justice Holmes eschewed such quintessentially subjective judgments when he refused to exclude circus posters from copyrightable subject matter. Dismissing the defendant's argument that such posters were not sufficiently "connected with the fine arts," the Court stated:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.

Id. at 251-52. *Accord Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 304, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *MCA, Inc.* v. *Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting) ("[w]e cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances"); *Pillsbury*

Co. v. *Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981) (court would not consider pornographic nature of parody in determining fair use).

Indeed, in proposing a particularized case by case, article by article inquiry into public benefit, Harper & Row would plunge this Court into the very quagmire of deciding what is and is not newsworthy, what is and is not news reporting, that was rejected in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974):

> And [the extension of the *New York Times* test proposed by *Rosenbloom*] would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of MR. JUSTICE MARSHALL, "what information is relevant to self-government." . . . We doubt the wisdom of committing this task to the conscience of judges.

Id. at 346 (citation omitted). *Cf. Regan* v. *Time, Inc.*, 104 S. Ct. 3262, 3293 (1984) (Stevens, J., concurring in part, dissenting in part) (stating that the law barring reproduction of currency for specified purposes should be construed to mean that when the "image is used in connection with a news article" it is protected "unless the editor's use of the image bears no rational relationship to the information or idea he is trying to convey"); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 581-82 (1977) (Powell, J., dissenting) (stating that in absence of a claim that use of a film clip of a "human cannonball" as news was "a subterfuge or cover for private or commercial exploitation," its use should not be penalized).

Harper & Row similarly would have this Court inquire into the comparative contribution to the public benefit between The Nation's use and the use that *Time* planned to make. Harper & Row claim that The Nation disserved the public by publishing its article before *Time* (with its larger circulation) published excerpts from the Ford manuscript. (Pet. Br. at 29) Given Harper & Row's view of the matter, publication by *Time* of a

news article about a forthcoming book that was to be excerpted in The Nation should be treated more favorably than publication by The Nation of an article about a forthcoming book to be excerpted in *Time*. All else aside, it is a position rife with constitutional flaws. *Cf. Anderson* v. *Celebrezze*, 460 U.S. 780 (1983); *Williams* v. *Rhodes*, 394 U.S. 23 (1968).

Congress has provided a far more neutral answer. Reference to "news reporting" in the statute means that the dissemination of information to people other than those who bought, reviewed, or heard the original is presumptively of public benefit. Thus, any inquiry into whether The Nation's readers are identical to *Time*'s and whether the information about Mr. Ford's definitive version of the pardon reached those who might otherwise not receive it is as unnecessary as it is unwarranted.

News reporting is a use explicitly favored by Congress. The Court of Appeals correctly found the first factor to weigh heavily in favor of fair use.[22]

B. The Nature Of The Copyrighted Work

The use that may be made of poetry differs dramatically from the use that may be made of a law book. The second fair use factor takes that difference into account. The Court of Appeals held that, because the memoirs were predominantly factual, copyright protection was narrowed. (Ct. App. Op. A-27 to A-28) That conclusion finds ample support in this Court's decision in *Sony* and in long-established law in the lower federal courts.

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22 The Court of Appeals also rejected as legally irrelevant the District Court's holding that the article was published for profit (Ct. App. Op. A-27), a rejection that Harper & Row do not appear to challenge before this Court. Of course, if The Nation's use somehow could be found unfair because the magazine is incorporated as a for profit corporation (the newsstand sales for the issue that included the article totalled $418 (R. Vol. I, TR A777)), no use of expression in a review printed in *The New York Times* or in a book published by Harper & Row could qualify as a fair use. *See Consumers Union of United States, Inc.* v. *General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3875 (U.S. May 14, 1984) (No. 83-1870).

In *Sony*, the majority noted that not "all copyrights are fungible" and went on to state that "[c]opying a news broadcast may have a stronger claim to fair use than copying a motion picture." 104 S. Ct. at 795 n.40. The dissent explicitly considered the second factor:

> The rationale guiding application of this factor is that certain types of works, typically those involving "more of diligence than of originality or inventiveness," *New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (N.J. 1977), require less copyright protection than other original works. Thus, for example, informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment.

Id. at 817 (Blackmun, J., dissenting). *Accord MCA, Inc.* v. *Wilson*, 677 F.2d 180, 182 (2d Cir. 1981); *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Arnstein* v. *Porter*, 154 F.2d 464, 468 (2d Cir. 1946); 3 M. Nimmer, *Nimmer on Copyright* § 13.05[A][2] at 13-73 to 13-74 (1984).

The Court of Appeals thus was correct in holding that the nature of the book favored a judgment of fair use. In discussing the information in the memoirs about the pardon, Professor Fred W. Friendly testified: "[that] had all the elements of a serious news story about one of the most cataclysmic and serious events in peace time." (JA 72) David Halberstam also "very strongly calibrate[d] and . . . authenticate[d] Mr. Navasky's judgment" that the pardon was the "crucial event" of Mr. Ford's term in office and the "central news" of the book. (JA 239-40; *see also* JA 255-56) There was no testimony to the contrary.[23]

Harper & Row now emphasize—and their supporting *amici curiae* focus exclusively on—the proposition that, because the

23 The District Court's opinion emphasized the lack of "newness" of information reported in The Nation article. (Dist. Ct. Op. B-6 to B-8) As to this as well, the testimony at trial was totally to the contrary. (*See* JA 72, 89-94, 100-02, 112-16, 121-32, 173-222, 239-68, 465-70)

book was to have been excerpted in *Time* two weeks after The Nation published its article, any claim of fair use must be rejected. (Pet. Br. at 29-34; *see generally* Brief for Volunteer Lawyers for the Arts as *Amicus Curiae*; Brief *Amicus Curiae* of the Association of American Publishers, Inc. ("AAP Br.")) As a matter of law, the language of the Copyright Act itself contradicts this position. Section 106, which sets forth the exclusive rights granted by the Act, is expressly and without exception made subject to section 107, which sets forth the fair use doctrine. Section 107 states:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting . . . , is not an infringement of copyright.

See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 57 (1975) ("Thus, everything in section 106 is made subject to sections 107 through 117, and must be read in conjunction with those provisions").

There are several other reasons for rejecting the contention that Congress intended to narrow or abandon fair use in unpublished works. First, Congress knew very well how to codify such a distinction. The Act expressly incorporates the distinction between published and unpublished works in several sections. *E.g.*, 17 U.S.C. § 104 (1982) (national origin); *id.* § 108 (library photocopying); *id.* § 302(c)(2) (duration). The Act did not do so with respect to fair use. In fact, one expert who testified before Congress, Professor Barns of the University of West Virginia, urged without effect that the same distinction be made in the new Act with regard to the fair use of unpublished works:

> I would respectfully urge that the law contain a provision that no unpublished work may be photoduplicated or otherwise reproduced without the consent of the author or his heirs.

Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831, and 6835 Before Subcomm. No. 3 of House Comm. on

Judiciary, 89th Cong., 1st Sess. 1888 (1965) (emphasis omitted).

Second, if Congress' specification of "news reporting" as a favored use in section 107 is to have meaning, it cannot be interpreted as being limited to reporting on books already published. Such an interpretation of news certainly should not be adopted without some support from the legislative history, if not from the statutory language itself.[24]

Lacking such support, Harper & Row and the *amici* rely instead on the section of the Senate Report discussing classroom use of photocopies, *viz.*, that the unavailability of a work weighs in favor of fair use unless that unavailability is the deliberate choice of the author, and urge that fair use of an unpublished work be allowed only in "extraordinary circumstances." (Pet. Br. at 33; *see* AAP Br. at 8) S. Rep. No. 473, *supra*, at 64.[25] That Report, however, is far from persuasive

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24 Basing its submission upon a newspaper article, Harper & Row suggest that, because a book written by New York Governor Mario Cuomo was not offered to book clubs for fear of "leaks," it may be inferred that publishers have been "deterred by the majority holding from licensing prepublication excerpts." (Pet. Br. at 29) The newspaper article in question makes no reference to this case at all. In fact, the briefest glance at newspapers and magazines currently on sale reveals that pre-publication excerpts continue to be routinely sold and published. Moreover, if such extra-judicial materials are to be considered, it is surely more relevant that newspapers have frequently printed news articles about forthcoming books on political affairs prior to their publication. *See The New York Times*, March 27, 1976, p. 9, col. 1 (news article about Woodward and Bernstein book, *The Final Days*, relating to resignation of President Nixon, notwithstanding forthcoming serialization); *The New York Times*, Sept. 23, 1976, p. 36, col. 1 (news story about revelations about President Ford in "unpublished memoir" of John Dean entitled *Blind Ambition*); *The New York Times*, Sept. 29, 1976, p. 1, col. 2 (news story about forthcoming autobiography of President Nixon based on "164 pages of completed manuscript" that was "closely guarded"); *The New York Times*, Dec. 10, 1981, p. A18, col. 1 (news story based on "uncorrected proofs" of forthcoming memoirs of John Ehrlichman).

25 The two prior House Reports contained the language that now appears in the Senate Report. H.R. Rep. No. 2237, 89th Cong., 2d Sess. 61 (1966); H.R. Rep. No. 83, 90th Cong., 1st Sess. 32-33 (1967). The deletion of the language appears to have been engendered by a

authority. The section quoted by Harper & Row was omitted from the House Report, which notes its inclusion in the earlier Senate Report and states: "[t]he Committee has reviewed this discussion and considers that it still has value as an analysis of various aspects of the problem," a reference that can be understood only as referring to the "problem" of fair use and photocopying. H.R. Rep. No. 1476, *supra*, at 67. Although the Conference Report does not mention unpublished works, it did adopt the guidelines for classroom copying (which do not discuss unpublished works) that replaced the Senate discussion in the House Report. H.R. Rep. No. 1733, 94th Cong., 2d Sess. 70 (1976).

The unacceptability of Harper & Row's proffered standard of "extraordinary" circumstances before any pre-publication use may be considered fair is further demonstrated by considering the application of that analysis to television and theatre performances, which, under the Act, do not constitute publication. 17 U.S.C. § 101 (1982). Such an analysis either requires that no such use be permitted or requires a finding that the use

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1975 Supplemental Report of the Register of Copyrights noting that the fair use commentary appearing in the Senate Report was virtually the same as discussions that had appeared as much as ten years earlier in House Reports. The Register urged "that the commentary be carefully reviewed and, where necessary, revised to take account of some of the criticisms leveled at particular statements or omissions." Draft, Second Supplemental Report of Register of Copyrights on the General Revision of the U.S. Copyright Law, Subcomm. on Courts, Civil Liberties, and the Administration of Justice of House Comm. on Judiciary, 94th Cong., 1st Sess. 27 (1975). This language is especially significant because the original report of the Register contained the statement that unpublished works were immune from fair use, Report of the Register of Copyrights, *supra*, at 40, a statement relied upon by *amici*. (AAP Br. at 14) This statement was criticized, however, at hearings before the House Committee, *e.g.*, *Staff of House Comm. on Judiciary, Discussion and Comments on the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 88th Cong., 1st Sess. 27 (Comm. Print 1963) ("I think the doctrine of fair use flatly applies to common law works") (remarks of H. Olsson), as well as before the Senate, *Copyright Law Revision: Hearings on S. 597 Before Subcomm. on Patents, Trademarks, and Copyrights of Senate Comm. on Judiciary*, 90th Cong., 1st Sess. 641-42, 645 (1967) ("we would see no reason why the general criteria set forth in Section 107 should not apply to unpublished as well as published materials") (statements of the American Historical Association).

of excerpts in a review of a play or television broadcast constitutes an "extraordinary" circumstance. The first result is insupportable under the law; the second shows the artificiality of a doctrine that requires "extraordinary" circumstances before any claim of fair use may be sustained. Notably, neither the majority nor the dissent in *Sony* adverted to the unpublished nature of the works in their analysis of whether home videotaping of in large part unpublished television broadcasts was a fair use. In sum, there is hardly, as Harper & Row claim, a "clear" legislative intent to narrow, let alone eliminate, fair use in unpublished works.[26]

Nor is Harper & Row's citation to cases and commentators for the principle that unpublished works were not subject to fair use at common law any more persuasive. (Pet. Br. at 30-31) The occasional statement of that principle by some commentators is not the basis for a holding in any case decided in this country. *See* 3 Nimmer, *Nimmer on Copyright* § 13.05 at 13-54 n.2 (1984). Indeed, the only case directly on point is flatly to the contrary. *Estate of Hemingway* v. *Random House, Inc.*, 53 Misc.2d 462, 279 N.Y.S.2d 51 (Sup. Ct. N.Y. Co.), *aff'd*, 25 App. Div. 2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968).

There are additional reasons of policy militating against Harper & Row's effort to preclude courts from considering the

26 In three cases decided under the 1976 Act, the courts applied a fair use analysis to an unpublished work. (*See* AAP Br. at 9, 12) In *Diamond* v. *Am-Law Publishing Corp.*, 1984 CCH Copyright Law Dec. ¶ 25,627 (S.D.N.Y.), *appeal argued*, No. 84-7136 (2d Cir. June 18, 1984), the court held that a newspaper's unauthorized publication of an unpublished letter to the editor was a fair use. In *Aitken, Hazen, Hoffman, Miller, P.C.* v. *Empire Construction Co.*, 542 F. Supp. 252, 260 (D. Neb. 1982), the court did not find the defendant's use of plaintiff's architectural plans a fair use, *inter alia* because the use served "[n]o educational, scientific, or historical purposes"; the court, however, did not mention the unpublished nature of the work. Similarly, although the court in *Association of American Medical Colleges* v. *Mikaelian*, 571 F. Supp. 144 (E.D. Pa. 1983), rejected fair use, the court in no way relied upon the unpublished nature of the pirated Medical College Aptitude Test questions.

factors set forth by Congress with respect to fair use in pre-publication situations. Under the rule proposed by Harper & Row, newly discovered correspondence between Winston Churchill and Franklin Roosevelt could be reported on only at the whim of their heirs. Indeed, by applying Harper & Row's rule to all unpublished works, except those involving "extraordinary" circumstances, Harper & Row would treat totally dissimilar situations identically.

The reasons that led courts to speak broadly about first publication are absent here.[27] The book was not intimate poetry kept in a locked drawer, nor personal diaries. This case, in short, does not involve a right of nonpublication.[28] Nor does it involve any effort to preserve personal privacy. The book came into being as a summary of a former president's term in office and was specifically intended for public discussion. As David Halberstam testified:

> [T]he fact is that this is a presidential document, this is Gerald Ford's own witness, his final summing up, not when he is before a committee or he is still an active officer with the limits that that places upon him, but that this is his summing up, it's a presidential document, it is a state paper. It makes it news.

(JA 251-52) There is no reason why traditional fair use analysis should not be applied to such a document. Once applied, there is no basis for differing with the Court of Appeals that the nature of the work is factual and political and thus is especially conducive to a finding of fair use.

27 There was no evidence that the material on which The Nation reported differed from that in the published book. A comparison of the corresponding sections of the published book (*e.g.*, R. Vol. III, PTX 3 E12-17, E21-23, E24-25, E25-26) with the unpublished manuscript (PTX 1a E474-87) demonstrates that virtually no changes were made.

28 The desire to keep personal writings private was included by Justice Brandeis and Mr. Warren as a privacy, not a property, right in their seminal article, L. Brandeis & S. Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193, 200-13 (1890).

C. The Amount And Substantiality Of The Portions Used

The amount of copyrighted material that may be used without ranging beyond the boundaries of fair use varies widely from case to case. *Compare Sony Corp. of America* v. *Universal City Studios, Inc.*, 104 S. Ct. 774 (1984) (verbatim copying of entire movies and television programs held to be fair) *and Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided Court*, 420 U.S. 376 (1975) (systematic photocopying of entire copyrighted articles held a fair use) *with Henry Holt & Co. ex rel. Felderman* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938) (use of three sentences from a book in an advertising pamphlet held not a fair use). An important factor in assessing the substantiality of the amount used is the purpose of the use: "in any given case this question cannot be answered without a consideration of the purpose for which the defendant's work will be used." 3 M. Nimmer, *Nimmer on Copyright* § 13.03[A][2] at 13-35 (1984) (footnote omitted).

The Court of Appeals correctly rejected the District Court's negative evaluation of the third fair use factor based on the District Court's perception that The Nation article had used "the heart of the book." (Ct. App. Op. A-28; *see* Dist. Ct. Op. B-8) Concluding that the "heart" referred to was the facts about former President Ford's pardon of Mr. Nixon—precisely what Harper & Row cannot protect under the copyright laws—the Court of Appeals held that the quotations from the Ford book were "informative and . . . neither superfluous or excessive for the article's purpose." (Ct. App. Op. A-29)

As the undisputed testimony demonstrated, the use by The Nation of approximately 300 copyrightable words in a 2,250-word article about a 200,000-word book was no more than was appropriate for reporting significant news. The bulk of The Nation article was comprised of expression far different from that of the manuscript. Quotations were used only to reproduce conversations between President Ford and other public officials when the precise manner in which President Ford

expressed himself was as newsworthy as what he had to say, *e.g.*, his explanation of his reasons for pardoning Mr. Nixon.[29]

Contrary to Harper & Row's contention (Pet. Br. at 32-33, 37), the proper legal standard is whether the amount used was appropriate to the purpose—here, reporting on the book. *See Italian Book Corp.* v. *American Broadcasting Cos.*, 458 F. Supp. 65, 68 (S.D.N.Y. 1978) ("ABC's recording of portions of the [copyrighted song], and its subsequent playing on the television news program, constituted an integral part of a news report on an event of public interest"); *cf. Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569 (1977) (commenting that a report on Zacchini's performance with descriptions, comments and perhaps including his picture would be "a very different case").

If The Nation had written an editorial, Harper & Row argue, The Nation would have used very little expression; therefore, the article as written took too much. (Pet. Br. at 37) Harper & Row might as well urge that if The Nation had chosen an entirely different topic to report on, it would have used no quotations from the Ford book at all. The law is to the contrary; the third fair use factor relates to the amount and substantiality of material used for the purpose the user chose, not the purpose the party suing would have preferred.

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29 Mr. Halberstam and Professor Friendly agreed—and there was no dispute in the record—that the amount of expression used was necessary for and appropriate to the purposes of the article. Mr. Halberstam testified:

> It seems to me Mr. Navasky did quite an honorable and responsible job of seeking for news and held down to an uncommon degree the direct quotations. I think to the degree he could he centered on news and he paraphrased. There is only one four, five or six line thing where he really directly quotes. I think it's on how Mr. Ford thinks Mr. Nixon looks, which is almost impossible to paraphrase.

(JA 265; *see* JA 116-17)

D. The Economic Impact Of The Article On The Market For The Copyrighted Work

The District Court concluded that the fourth factor weighed against a finding of fair use because Harper & Row's agreement with *Time* was aborted. (Dist. Ct. Op. B-8) But, as the Court of Appeals determined, by failing to take into account that the article consisted almost wholly of uncopyrightable facts and material in the public domain, the District Court essentially granted copyright protection by fiat where none existed by law.

What both *Time* and Harper & Row wished to guard was the exclusive right to the information in the manuscript. That conclusion is confirmed by Harper & Row's contract with President Ford—requiring Mr. Ford to refrain from disclosing information (JA 484)—as well as by Harper & Row's contract with *Time*—requiring renegotiation if the news leaked out.[30] (R. Vol. IV, PTX 9 E565)

That both The Nation and *Time* viewed the information in the book about the pardon as particularly newsworthy is hardly surprising. It shows, rather, consistent judgment—borne out by common sense—that readers would be interested in the facts about the central political event of the 1970s. But that is precisely what is not subject to copyright protection. The Court of Appeals was plainly correct in holding that any injury that may have been caused by The Nation's use of the news—of facts—is an injury for which Harper & Row may not be compensated by the copyright laws.

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30 That conclusion is also confirmed by reading the article itself. (Ct. App. Op. A-31 to A-38)

III

THE COURT OF APPEALS CORRECTLY TOOK ACCOUNT OF FIRST AMENDMENT PRINCIPLES

Two of the three questions that Harper & Row claim are raised by this case relate to the First Amendment. The first is whether the First Amendment requires that copyright protection for non-fiction works be narrowed; the second is whether the First Amendment should "prevail over copyright" when the copyright owner is soon to publish his or her work. (Pet. Br. at *i*)

Neither of these issues is presented by this case. The Court of Appeals said nothing at all about the First Amendment "prevailing" over the copyright laws; nor did it rule that non-fiction works must always receive less protection under the Copyright Act because of the First Amendment.

Without question, the Court of Appeals concluded that there was need to strike "a definitional balance" between the First Amendment and copyright by permitting the free communication of facts while still protecting an author's expression. (Ct. App. Op. A-18) Without doubt, the court emphasized that an interpretation of the Copyright Act that permitted information to be copyrighted "would clash with the First Amendment on every occasion in which an author chose to put in his own words facts which had already been described by another writer." (Ct. App. Op. A-18 to A-19) Nor can there be any quarrel that the Court of Appeals' ruling recognized the risks of a strained and expansive definition of "expression" in the context of works of "news and history" (Ct. App. Op. A-19) and was generally informed by the need to accommodate First Amendment interests without ignoring long-standing principles of copyright law.

In so ruling, the Court of Appeals acted in conformity with well-established law. Not only are the idea-expression dichotomy and the fair use doctrine consistent with First Amendment principles: they accommodate those principles by

assuring that the copyright laws will not be interpreted in a fashion inconsistent with the First Amendment itself. *See Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977) (emphasizing the absence of any restraint on an idea or concept); *Dallas Cowboys Cheerleaders* v. *Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979) ("[t]he fair use doctrine allows adjustments of conflicts between the first amendment and the copyright laws"); *Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) ("the idea-expression dichotomy . . . serves to accommodate the competing interests of copyright and the First Amendment"); *cf. Keep Thomson Governor Committee* v. *Citizens for Gallen Committee*, 457 F. Supp. 957 (D.N.H. 1978).

Given the scope of the protections built into the copyright laws to accommodate First Amendment interests, it remains an open question whether there is a need for First Amendment protection beyond that afforded by the Copyright Act itself. *See Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1178, 1184 (5th Cir. 1980) (Brown, J., concurring in part and Tate, J., concurring). What cannot be questioned, however, is that the crabbed approach to principles of freedom of expression reflected in Harper & Row's submission would, if adopted, pose a grave, if utterly unnecessary, conflict between the First Amendment and the Copyright Act. The copyright clause of the Constitution is, as this Court has observed, "permissive" not mandatory with respect to the protection of copyright interests. *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U.S. 518, 530 (1972). The Constitution does not require the adoption of any copyright law; it surely does not require a copyright law that would override First Amendment rights.[31]

31 The views of James Madison, the draftsman of the copyright clause, and of Thomas Jefferson are telling. Madison, who supported the adoption of a written Bill of Rights on the ground that "the political truths declared in that solemn manner [will] acquire by degrees the character of fundamental maxims of Free Government," 3 *Roots of the Bill of Rights* 614-18 (B. Schwartz, ed. 1980), believed that copyright and patent protection was "too valuable to be wholly renounced" but nonetheless dangerous enough so that the public should retain the right "to abolish the privilege at a price to be specified in the grant of it." *Id.* at 615. Jefferson believed that a Bill of Rights explicitly protecting freedom of the press was something "no just government should refuse, or resist on influence." *Id.* at 607. By contrast, the notion of granting the "exclusive rights to the profits" flowing from ideas "as an encouragement to men to pursue ideas" was, Jefferson observed, something that "may or may not be done according to the will and convenience of the society, without claim or complaint from anybody." *The Jefferson Cyclopedia* 433 (J.P. Foley, ed. 1967).

Harper & Row's view of the Copyright Act would threaten core First Amendment principles. Permitting uncopyrightable fact to be transformed into a copyrightable "totality" by placing it in close proximity to expression would, as the Court of Appeals observed, empower public officials "to take private possession of the most important details of a nation's historical and political life. . . ." (Ct. App. Op. A-21) Treating as a "commercial"—and hence presumptively infringing—user any publication that is sold to the public would imperil every publication that prints news. Barring any use, however slight, of expression before its author chooses to sell it would continually interfere with the public's ability to be informed.

First Amendment rulings of this Court have been far more responsive to claims of freedom of expression. Cases such as *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), and *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), establish that the publication of truthful information about matters of public importance is entitled to First Amendment protection even though the state has a legitimate interest in not having the information published. In those cases, this Court made clear that once information reaches the press, the press is free to publish that information notwithstanding a strong public interest in secrecy. As Chief Justice Burger summarized the law, "the government cannot restrain communication of whatever information the media acquire—and which they elect to reveal." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 10 (1978) (plurality opinion).

Other cases, as well, illustrate the constitutional price Harper & Row's view of the Copyright Act would exact. In cases such as *Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966), and *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 (1976) (*per curiam*), this Court emphasized the unique role in our society of political discussion and debate about candidates for public office. The Nation article rests securely within this core of First Amendment values. "By far the greatest part of the article," as the Court of Appeals observed, "was no more than the reporting of information concerning political decisions at the highest level of government." (Ct. App. Op. A-29) In fact, the article related, almost in its entirety, to individuals still under consideration for the highest positions in the nation. It is difficult to envision material more protected by the First Amendment.

There are other First Amendment costs that the adoption of Harper & Row's view of copyright would inflict. Prior restraints are, for example, routinely available in copyright cases. *See L.A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U.S. 100, 102 (1919); *New York Times Co.* v. *United States*, 403 U.S. 713, 731 n.1 (1971) (White, J., concurring). But even to contemplate the issuance of an injunction against publication of a news article about President Ford's reasons for pardoning President Nixon is to recall this Court's conclusion in a different context that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976). We do not suggest that the disfavor with which prior restraints are viewed should lead to the conclusion that no news reporting may be enjoined, however slavishly it copies another's work. What it does suggest is that there is need for sensitivity in balancing the claims of the law of copyright and those of the First Amendment. The opinion of the Court of Appeals displayed just such sensitivity.

The facts of this case are not in dispute. Harper & Row paid President Ford to write a book that included "unpublished materials" about his pardon of Mr. Nixon and about other newsworthy events that occurred during his presidency. They

caused Mr. Ford not to answer questions about the pardon. They sold the book to the public on the basis of its news "revelations." In such circumstances, no application of First Amendment principles should permit them now to interpret the Copyright Act to impose liability on The Nation for revealing information about the pardon and other matters of state or for quoting what the Court of Appeals rightly characterized as "a meager, indeed an infinitesimal amount of Ford's original language." (Ct. App. Op. A-32)

Fortunately, the Copyright Act neither requires nor permits such a result. In taking care to apply the Copyright Act in a manner consistent with First Amendment principles, the Court of Appeals acted in full accord with both the Copyright Act and the First Amendment.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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August 20, 1984